Supreme Court, U. S.
FILED
JAN 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, ET AL.,
Petitioners,

vs.

JANE DOE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Reasons for Granting the Writ	3
1. The Issue Raised by Respondents Here Is One of Great National Importance, Affecting the Practices of Every Private Hospital in the Nation	3
2. The Decision Below Is in Conflict with the Decision of the Court of Appeals for the Seventh Circuit in Doe v. Bellin Memorial Hospital	3
3. The Questions Presented Here Are Cognate to Those Which This Court Already Has Under Consideration and Their Resolution Is Necessary to a Complete Resolution of the Question When a Private Not-for-Profit Hospital Must Afford Voluntary Abortions on Demand	6
Conclusion	7
Appendix: Opinion of the Supreme Court of New Jersey	A1

TABLE OF AUTHORITIES CITED.

Cases.

Doe v. Bellin Memorial Hospital, 479 F. 2d 756 (7th Cir. 1973) 3, 4
Doe v. Bolton, 410 U. S. 179 (1973) 2, 3, 4, 6
Doe v. Bridgeton Hospital Association, 130 N. J. Super. 416 (L. Div. 1974), *appeal certified* 69 N. J. 85 (1975) *passim*
Doe v. Hale Hospital, 500 F. 2d 144 (1st Cir. 1974) 5
Doe v. Poelker, 515 F. 2d 541 (8th Cir. 1975), *certiorari granted*, 44 U. S. L. W. 3761 (No. 75-442, 6 July 1976) 5, 6
Greco v. Orange Memorial Hospital Corp., 513 F. 2d 873 (5th Cir. 1975) 4
Maher v. Roe, 414 F. Supp. 1368 (D. Conn.) *probable jurisdiction noted*, 44 U. S. L. W. 3761 (No. 75-1440, 6 July 1976) 6
Meyer v. Nebraska, 262 U. S. 390 (1923) 5
Nyberg v. City of Virginia, 495 F. 2d 1342 (8th Cir. 1974) 5
Pierce v. Society of Sisters, 268 U. S. 510 (1925) 5
Roe v. Wade, 410 U. S. 113 (1973) 2, 3, 4, 5, 6
Traux v. Raich, 239 U. S. 33 (1915) 5
Word v. Poelker, 495 F. 2d 1349 (8th Cir. 1975) 6

Statutes.

28 U. S. C. § 1257(3) 1

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JANE DOE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Petitioners respectfully request that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of New Jersey in the above-entitled cause.

OPINION BELOW.

The opinion of the New Jersey Supreme Court is not yet reported. It is set out in the Appendix hereto. The decision of the trial court dismissing the complaint is reported at 130 N. J. Super. 416 (L. Div. 1974).

JURISDICTION.

The opinion of the Supreme Court of New Jersey was rendered on 17 November, 1976; the judgment was entered on 10 January, 1977. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Is there a constitutional right to a "voluntary abortion" that may be asserted against a private hospital, as the court below held, or is there only a constitutional right not to have the State foreclose the performance of such abortions, as this Court has held?

2. Is it a violation of the Due Process Clause of the Fourteenth Amendment for a state court to compel the use of private hospitals to perform "voluntary abortions" on demand, contrary to the policies established by the governing bodies of these private hospitals?

STATEMENT.

"The plaintiffs [respondents], Jane Doe, Mary Roe and their doctors, Dr. Edward S. Milner, Jr. and Dr. Calvin Hahn, instituted an action [in the New Jersey courts] to compel the Bridgeton Hospital Association (Bridgeton), the Newcomb Hospital (Newcomb) and the Salem County Memorial Hospital (Salem) to make their facilities available to the plaintiffs and their physicians, members of the hospital staffs, for elective abortion procedures during the first trimester of pregnancy." N. J. Supreme Court Opinion, p. 2; App. p. A-2.

The trial court dismissed the complaint. 130 N. J. Super. 416 (L. Div. 1974). While the appeal to the intermediate appellate court was pending, the Supreme Court of New Jersey took jurisdiction of the appeal by certificatior 69 N. J. 85 (1975).

"All three hospitals have been incorporated as non-profit non-sectarian institutions for the purpose of making available to the public medical facilities where divers types of medical services may be performed. . . . Each of the [hospital] boards had adopted a policy of permitting only therapeutic abortions. After the United States Supreme Court decisions in *Roe* v. *Wade* [and] *Doe* v. *Bolton* . . ., each board reconsidered its previous policy. Although the medical staffs at Bridgeton and Salem

favored a change, the three boards reaffirmed their previous policies prohibiting elective abortions." Opinion, pp. 4-5; App. p. A4.

The New Jersey Supreme Court held that, because private hospitals are corporations affected with a public interest, and because the "federal constitutional right to an abortion during the first trimester is now well-settled" Opinion, p. 15, App. p. A11, their obligations are, in effect, the same as that of a state hospital in this regard. The Court held that these private hospitals are under a legal duty to provide their staffs and facilities for the performance of elective abortions as plaintiffs claimed. Judgment was entered for the plaintiffs and it is from this judgment that petitioners seek review in this Court.

REASONS FOR GRANTING THE WRIT.

1. The Issue Raised by Respondents Here Is One of Great National Importance, Affecting the Practices of Every Private Hospital in the Nation.

The question whether a private hospital is under a legal duty to afford elective abortions on application is one that is necessarily faced by every private general hospital in the nation. It is a question that has not yet been answered by this Court. There can be no adequate resolution of the issue until this Court determines whether the implications of *Doe* v. *Bolton*, 410 U. S. 179 (1973), and *Roe* v. *Wade*, 410 U. S. 113 (1973), extend to compelling a private institution to afford such services although it is contrary to the established policy of the private hospital to do so.

2. The Decision Below Is in Conflict with the Decision of the Court of Appeals for the Seventh Circuit in Doe v. Bellin Memorial Hospital.

On a complaint almost four-square on the facts with the one offered by plaintiffs here, the Court of Appeals for the Seventh

Circuit held that there was no right to compel a private hospital to afford elective abortions. *Doe* v. *Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir. 1973).

> There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves. [479 F. 2d 759-60.]

Contrary to the judgment of the Seventh Circuit, the Supreme Court of New Jersey held that a state law allowing hospitals to determine for themselves whether to undertake elective abortions would constitute unconstitutional state action. "To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action." Opinion, p. 15; App., p. A11.

The Seventh Circuit said in *Bellin Memorial Hospital*:

> We find no basis for concluding that by accepting Hill-Burton funds the hospital unwittingly surrendered *the right it otherwise possessed to determine whether it would accept abortion patients.* [479 F. 2d at 761, emphasis added.]

Yet it is exactly the "right" they "possessed to determine whether [they] would accept abortion patients" of which petitioners were deprived by the judgment below.

We respectfully submit that it is a long—and improper—step from this Court's mandate in *Wade* and *Bolton, supra,* that a state may not constitutionally inhibit access to voluntary abortions to the conclusion of the court below that private hospitals must afford such abortions to those who demand them. Even where courts have found a duty on the part of state hospitals to provide voluntary abortions for those who demand them, they have recognized that private hospitals are not under the same obligation. Thus, in *Greco* v. *Orange Memorial Hospital Corp.*, 513 F. 2d 873, 877-78 (5th Cir. 1975), the court said:

> The district court correctly held that a private hospital is subject to the provisions of 42 U. S. C. § 1983 and the Fourteenth Amendment only if its activities are significantly affected with state involvement. Section 1983 and the Fourteenth Amendment do not preclude invidious discrimination by private parties. . . .

And in *Doe* v. *Poelker*, 515 F. 2d 541, 546 (8th Cir. 1975), the court wrote:

> We stress, however, that the remedy is to be directed at the city officials acting as such and should declare the necessity to take certain official actions. It should not require that any present member of the staff of the public hospitals or any individual employee of the hospitals participate or assist in any way in the performance of abortions if, as a matter of conscience, he objects to so doing. *See Doe* v. *Hale Hospital*, 500 F. 2d 144, 147 (1st Cir. 1974), cert. denied, 420 U. S. 907, 95 S. Ct. 825, 42 L. Ed. 2d 837 (1975); *Nyberg* v. *City of Virginia* [495 F. 2d 1342 (8th Cir. 1974)] at 1347.

It is our position that, just as it may be a violation of due process of law for a state to deprive a person of her right to a voluntary abortion, it is a denial of due process of law to compel private persons to perform voluntary abortions against their wills. Cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-535 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400 (1923); *Truax* v. *Raich*, 239 U. S. 33, 41 (1915), all cited by Mr. Justice Stewart in his concurring opinion in *Wade*, 410 U. S. at 168. The New Jersey court's judgment here is a requirement that the petitioners suborn what they, and millions of others, rightly or wrongly, regard as morally reprehensible actions.

3. The Questions Presented Here Are Cognate to Those Which This Court Already Has Under Consideration and Their Resolution Is Necessary to a Complete Resolution of the Question When a Private Not-For-Profit Hospital Must Afford Voluntary Abortions on Demand.

As the Court of Appeals for the Eighth Circuit has said, in *Word* v. *Poelker*, 495 F. 2d 1349, 1350 (8th Cir. 1974):

> (2) Even so, no woman has a right to an abortion "at whatever time, in whatever way, and for whatever reason she alone chooses;" there is no right to abortion on demand. Roe v. Wade . . .; Doe v. Bolton. . . .

This Court has pending for decision two cases raising the question whether state hospitals must afford voluntary abortions to those who demand them or must provide the funds necessary to secure such abortions. *Poelker* v. *Doe*, 515 F. 2d 541 (8th Cir. 1975), *certiorari granted*, 44 U. S. L. W. 3761 (No. 75-442, 6 July 1976); *Maher* v. *Roe*, 414 F. Supp. 1368 (D. Conn.), *probable jurisdiction noted*, 44 U. S. L. W. 3761 (No. 75-1440, 6 July 1976). If the Court were to decide that there is no right to compel a state hospital to provide such abortions, it would seem *a fortiori* that there could be no such duty on the part of a private hospital. If the Court were to decide, however, that there is an obligation on the part of a state hospital to afford such abortions, the question would remain whether there were a similar obligation for private hospitals. A resolution of this case would eliminate that hiatus in the law.

CONCLUSION.

For the reasons heretofore stated, we submit that this Court should grant certiorari to review the judgment of the New Jersey Supreme Court in this case.

Respectfully submitted,

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APPENDIX.

SUPREME COURT OF NEW JERSEY

A-154 September Term 1975

JANE DOE and MARY ROE, individually and on behalf of all other women similarly situated, and DR. EDWARD S. MILNER, JR., and DR. CALVIN HAHN, individually and on behalf of all other physicians similarly situated,

Plaintiffs-Appellants,

vs.

BRIDGETON HOSPITAL ASSOCIATION, INC., NEWCOMB HOSPITAL, and SALEM COUNTY MEMORIAL HOSPITAL,

Defendants-Respondents.

Argued May 10, 1976—Decided November 17, 1976.

On certification to the Superior Court, Law Division, whose opinion is reported at 130 *N. J. Super.* 416 (1974).

Ms. Nadine Taub argued the case for appellants (*Ms. Taub* and *Mr. Steven Kleiner,* attorneys; *Mr. Rand Rosenblatt,* a member of the Pennsylvania bar, of counsel).

Ms. Phyllis Gelman argued the cause for *amicus curiae* New Jersey State Office of Legal Services (*Mr. Warren E. Smith,* Director, attorney; *Ms. Gelman* and *Ms. Phyllis G. Warren* on the brief).

Mr. William P. Doherty, Jr. argued the cause for respondent Bridgeton Hospital Association, Inc.

Mr. Wayland Lucas argued the cause for respondent Salem County Memorial Hospital.

Mr. Joseph D. O'Neill argued the cause for respondent Newcomb Hospital (*Messrs. Shapiro, Eisenstat, Capizola, Petrino, Lisitski & Gabage*, attorneys; *Mr. Frank J. Petrino, Mr. O'Neill* and *Mr. Doherty* on the joint brief).

Mr. John R. Heher argued the cause for *amicus curiae* New Jersey Hospital Association (*Messrs. Smith, Stratton, Wise & Heher*, attorneys; *Mr. Heher* of counsel; *Mr. Frank J. Petrino* on the brief).

Messrs. Lieb, Wolf & Samson submitted a brief on behalf of *amicus curiae* Religious Coalition for Abortion Rights (*Ms. Ellen B. Kulka* and *Ms. Samantha Shad*, a member of the New York and District of Columbia bars, of counsel and on the brief).

The opinion of the Court was delivered by SCHREIBER, *J.*

The plaintiffs, Jane Doe, Mary Roe and their doctors, Dr. Edward S. Milner, Jr. and Dr. Calvin Hahn, instituted an action to compel the Bridgeton Hospital Association (Bridgeton), the Newcomb Hospital (Newcomb) and the Salem County Memorial Hospital (Salem) to make their facilities available to the plaintiffs and their physicians, members of the hospital staffs, for elective abortion procedures during the first trimester of pregnancy.[1] Upon the conclusion of the trial, the court dismissed the complaint. 130 N. J. Super. 416 (L. Div. 1974). The plaintiffs appealed. While the matter was pending unheard in the Appellate Division, this Court, *sua sponte*, certified the cause. 69 N. J. 85 (1975). *R.* 2:12-1.

The plaintiffs proceeded on constitutional and non-constitutional grounds. Constitutionally, the plaintiffs alleged violations of their rights under the First, Fifth, Eighth, Ninth and

1. The complaint alleges that the plaintiffs were suing on behalf of themselves and all others similarly situated. Because there was no compliance with the requirements of a class action, *R.* 4:32-1 *et seq.*, we decline to consider this case as such.

Although before trial one female plaintiff had obtained an abortion and the other had delivered a child, the public interest warrants a resolution of the cause. *John F. Kennedy Memorial Hospital* v. *Heston*, 58 N. J. 576 (1971). *See Roe* v. *Wade*, 410 U. S. 113, 125, 93 S. Ct. 705, 35 L. Ed. 2d 147, 161 (1973).

Fourteenth Amendments to the United States Constitution and under Article I of the New Jersey Constitution. They asserted that, because of the federal, state, county and municipal financial aid received by the hospitals, their refusals to permit elective abortions constituted state action. The non-constitutional rationale was that the hospitals, as quasi-public institutions, owed an obligation to the public, including the plaintiffs, to make their facilities available; that the defendants had violated that duty by establishing arbitrary and unreasonable rules prohibiting elective abortions; that these rules were reviewable by the Court, and should be declared null and void.

The defendants contended that they were private non-profit hospitals governed by their respective boards of trustees and that they had the absolute right to determine who should use their facilities and whether elective abortions should be permitted.

For the purposes of this opinion, a summary of the facts set forth by the trial court suffices.

Bridgeton is located in the City of Bridgeton, Cumberland County; Newcomb, in the City of Vineland, Cumberland County; and Salem, in the City of Salem, Salem County. Each is the only general hospital open to the public situated in its respective municipality, that being each hospital's primary service area. Elective abortions are permitted in hospitals or clinics located in Philadelphia, New York City, Wilmington, Atlantic City and Camden. Bridgeton is about 47 miles from Atlantic City, 37 from Camden, 35 from Philadelphia, 32 from Wilmington and 135 from New York City. Newcomb is 30 miles from Atlantic City, 31 from Camden, 122 from New York City, 48 from Wilmington, and 35 from Philadelphia. Salem is 64 miles from Atlantic City, 31 from Camden, 130 from New York City, 15 from Wilmington and 39 from Philadelphia.

All three hospitals have been incorporated as non-profit non-sectarian institutions for the purpose of making available to the public medical facilities where divers types of medical services may be performed. Each is governed by a board of trustees or directors who are elected by contributors to the hospitals. (Salem's and Newcomb's annual dues were $5 per annum and Bridgeton's were $15 per annum.) The respective boards in each institution are empowered to determine and decide policy matters. When these policies involve medical questions, the boards usually follow the recommendation of the medical staffs. Each of the boards had adopted a policy of permitting only therapeutic abortions. After the United States Supreme Court decisions in *Roe* v. *Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *reh. den.*, 410 U. S. 959, 93 S. Ct. 1409, 1410, 35 L. Ed. 2d 694 (1973), and *Doe* v. *Bolton*, 410 U. S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), *reh. den.*, 410 U. S. 959, 93 S. Ct. 1409, 1410, 35 L. Ed. 2d 694 (1973), each board reconsidered its previous policy. Although the medical staffs at Bridgeton and Salem favored a change, the three boards reaffirmed their previous policies prohibiting elective abortions.

The two female plaintiffs consulted the plaintiff Dr. Milner during the first trimester of their pregnancies. They desired abortions and Dr. Milner, who had staff privileges at both the Bridgeton and Salem hospitals, agreed to perform the operations. He attempted to make arrangements for the plaintiff Mary Roe, who lived in Salem, at the Salem hospital, but was denied use of the facilities. Dr. Milner attempted to arrange for Jane Doe's admission to the Bridgeton hospital, since she resided in Bridgeton, but that hospital also refused. Dr. Milner then referred her to the plaintiff Dr. Hahn, who was a member of the Newcomb hospital staff, but he was not permitted to use its facilities for an elective abortion.

The abortion procedure during the first trimester is relatively simple. A vacuum aspirator which operates on a suction principle is inserted into the uterus to remove its contents. It is possible to perform abortions in the doctor's office but since an anesthetic must be given, it is considered advisable to perform them at the hospital where the women are treated as outpatients.

The operating and recovery rooms are needed for approximately 30 minutes, of which only 10 minutes are devoted to the procedure itself. Thereafter the patient remains in the recovery room for approximately three hours until the anesthesia has worn off. Thus a woman may readily enter and leave the hospital on the same day. Therapeutic abortions are more serious medically than elective abortions during the first trimester and these patients usually are not treated as outpatients.

The record is clear that the Bridgeton, Newcomb and Salem hospitals have all the medical facilities necessary to perform elective abortions. Their operating rooms are also available during some periods when they could be used for this purpose. The parties stipulated that there were doctors on the staffs of each of the hospitals who were willing and qualified to perform elective abortions and that the occupancy rate in 1971 of obstetrical beds in Bridgeton was 61%, in Newcomb, 58%, and in Salem, 37%.

The trial court reasoned that the constitutional grounds urged by the plaintiffs were invalid because no state action was involved. It rejected the defendants' contention that the principle of *Greisman* v. *Newcomb Hospital*, 40 N. J. 389 (1963), was limited to hospital policies excluding physicians from practicing at a hospital and held that "[t]he fact that the policy under attack here is concerned directly with patient services is not sufficient to distinguish the holding in *Greisman* so as to render it inapplicable." [130 N. J. Super. at 436]. It then turned to the issue of whether the action complained of was "arbitrary and

unreasonable in the sense that the adopted policy is so inimical to the public good that it must be set aside." [*Id.* at 437]. Finding that moral and religious beliefs could reasonably justify the adoption of the regulations, it concluded that there was just cause for their promulgation.

It is necessary to return to the *Greisman* case for a full comprehension of its principle. Dr. Griesman, holder of a degree of doctor of osteopathy, who held a license to practice medicine and surgery, applied for membership on the Newcomb hospital staff. Membership was denied because of a by-law requirement that applicants be graduates of a medical school approved by the American Medical Association. The Court held that the by-law provision was arbitrary and unreasonable and that the hospital, although a non-profit private corporation, was under a duty to consider Dr. Greisman's application because of its public status. Although at common law most businesses had no public obligations, *Garifine* v. *Monmouth Park Jockey Club*, 29 N. J. 47, 50-51 (1959), Justice Jacobs noted for the Court in *Greisman* that some private businesses had been subject to judicial regulation for the common good. These institutions were quasi-public and, as such, those entrusted with their operation acted as trustees for the public. The principle was enunciated by Holt, C. J., in *Lane* v. *Cotton*, 12 Mod. 472, 484, 88 Eng. Rep. 1458, 1464-1465 (K. B. 1701):

> * * * [W]here-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him; * * *. If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that

> will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier; * * *.

Although *Greisman, supra*, dealt with the right of a doctor to apply for admission to the hospital staff and involved the somewhat monopolistic control over the rights of a doctor to practice medicine at a given location, the underlying principle rests, as the trial court in this case observed, on a much broader doctrine, the obligation of a quasi-public entity to serve the public.[2] In *Greisman, supra,* Justice Jacobs recognized that a patient in the Vineland area had a protectable interest in being served at the Newcomb hospital. He rejected the argument "that there are other hospitals outside the metropolitan Vineland area, for they may be too distant or unsuitable to his needs and desires." *Greisman* v. *Newcomb Hospital, supra,* 40 N. J. at 402. The hospital trustees' managerial powers were deeply imbedded in public aspects and, as fiduciary powers, had to be exercised reasonably and for the public good.

The Bridgeton, Salem and Newcomb hospitals are non-profit corporations organized to serve the public by operating medical facilities. Each receives substantial financial support from federal and local governments and the public. Each is the beneficiary of tax exemptions. Each is an institution whose medical facilities are available to the public, particularly those who live in their primary service areas. The properties of these

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2. Initially hospitals were designed to serve as a place for the custodial care of the dying poor. Hamilton, *The Voluntary Hospital in America—Its Role, Economics, and Internal Structure,* in *Medical Care: Readings in the Sociology of Medical Institutions* 394 (Scott & Volkart eds. 1966). Curing the ill did not become a prime hospital purpose until the latter part of the 19th century. M. Risley, *House of Healing: The Story of the Hospital* 16 (1961); 12 *Collier's Encyclopedia* 292 (1972).

hospitals are devoted to a use in which the public has an interest and are subject to control for the common good. *See also De Portibus Maris*, 1 *Hargrave Law Tracts* 77-78 (1787). As quasi-public institutions, their actions must not contravene the public interest. They must serve the public without discrimination. Their boards of directors or trustees are managing quasi-public trusts and each has a fiduciary relationship with the public. Like other businesses affected with a public interest, hospitals have been subjected to legislative control. The Health Care Facilities Planning Act, N. J. S. A. 26:2H-1 *et seq.*, has declared the State's public policy to be that hospital services "of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost are of vital concern to the public health." N. J. S. A. 26:2H-1. The act provides that no hospital may be constructed or enlarged until a certificate of need is issued by the State Commissioner of Health, N. J. S. A. 26:2H-7, 8 and 9, who is empowered to conduct periodic inspections "with respect to the fitness and adequacy of the premises, equipment, personnel * * *." N. J. S. A. 26:2H-5. The Commissioner has adopted regulations to effectuate the purposes of the act. N. J. A. C. 8:33-1.1 *et seq.* Recognition by the Legislature of the special status of the hospital is consonant with its public nature and responsibilities. Judicial review and legislative control are predicated on recognition of the quasi-public status of the hospital and its obligation to serve the public.

Proprietors of privately owned quasi-public businesses may operate within a wide discretionary range, subject to limitations called for by the commonweal. The nature, scope, and limitations of the innkeeper's descretion are illustrative. He was bound by common law to receive and lodge all comers in the absence of a reasonable ground of refusal. 21 *Halsbury's Laws of England* 445-446 (3d ed. 1957). A valid refusal had to be related

to the inn's operations as an inn. *White's Case*, 2 *Dyer* 158b, 73 Eng. Rep. 343 (K. B. 1558). Full occupancy or the traveler's condition, such as drunkenness, which might affect other guests constituted good cause for exclusion. On the other hand, arrival at a later hour or on a Sunday was held to be insufficient to deny lodging. *Rex* v. *Ivens*, 7 *Car. & P.* 213, 173 Eng. Rep. 94 (K. B. 1835). There had to be a rational relationship, a causal nexus, between the reason for the refusal and the function of the inn. Similarly, common carriers were required to have a reasonable ground, such as lack of space, for refusing service. "For instance, the carrier is not bound to receive gamblers, thieves, or known pickpockets, who seek to board the train to ply their vocation—persons whose conduct is riotous or disorderly, or one whose person or clothing is so filthy as to be obnoxious to other passengers, or who is afflicted with a contagious disease, or intoxicated to such an extent as to render it probable that he would be disagreeable or annoying to passengers." *Atwater* v. *Del., Lack. & W. R. R. Co.*, 48 N. J. L. 55, 61 (Sup. Ct. 1886).

Justice Jacobs' concluding paragraph in *Greisman* is worthy of reiteration:

> Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public. They must recognize that their powers, particularly those relating to the selection of staff members, are powers in trust which are always to be dealt with as such. While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined

> to intervene where, as here, the powers were invoked at the threshold to preclude an application for staff membership, not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in furtherance of the common good. [40 N. J. at 403-404].

When the practice or regulation enhances standards of medical care or public welfare, broad judicial support is warranted.

The hospital rule or regulation should be related to the hospital's purposes and operational needs. *Davis* v. *Morristown Memorial Hospital,* 106 N. J. Super. 33, 43 (Ch. Div. 1969). Moral concepts cannot be the basis of a non-sectarian non-profit eleemosynary hospital's regulations where that hospital is holding out the use of its facilities to the general public. The board of trustees or directors, although vested with managerial discretion within the framework of the hospital's functions and purposes, may not promulgate unrelated policies. When it does so, its determinations are unsupportable and arbitrary. *Guerrero* v. *Burlington County Memorial Hospital,* 70 N. J. 344, 356-357 (1976).

Neither the trial court nor the defendants have suggested that the regulations prohibiting elective abortions were adopted to further any medical standards. Medically there is no valid distinction which justifies permission to utilize hospital facilities and equipment for therapeutic, but not elective abortions. The three hospitals, Newcomb, Bridgeton and Salem, have the equipment, the facilities, and the operative and emergency room capacity for both.

The defendants contend that the rules reflect the community's conscience and that to overrule that sentiment would cause the loss of substantial financial support. The contention rests on two assumptions—that a majority of the residents in the communities served by the three non-sectarian hospitals are opposed to permitting the facilities to be used for first trimester

abortions and that these contrary-minded members of the citizenry will eliminate or reduce their financial support for the hospitals. The record does not establish the first premise. Even though the propriety of elective abortions provokes highly emotional responses, it is extremely doubtful that the public will not assist the hospitals whose services are so vital for the public health and welfare in the community. Furthermore the defendants' contention conflicts with and ignores the underlying principle of a non-sectarian hospital, whose basic purpose is to make available hospital facilities for the care and treatment of the public.

This is not to say that religious beliefs may or may not be appropriate grounds for a hospital operated by a recognized religious body to prohibit elective abortions. We are not passing upon the issues which may be considered in that context, particularly since the questions are not before us and have not been fully briefed and argued by the parties.

While this cause was pending on appeal, an act commonly referred to as the conscience law, relating to abortions and sterilization, was enacted. N. J. S. A. 2A:65A-1 *et seq.* That law provides that no hospital shall be required to provide abortion services or procedures, and the refusal to perform, assist in the performance or provide abortion services shall not constitute grounds for civil or criminal liability, disciplinary action or discriminatory treatment. All parties have requested that we consider the viability of this statute and we do so, in the limited context of this case. To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action, *Reitman* v. *Mulkey,* 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967). *Cf. King* v. *So. Jersey Nat. Bank,* 66 N. J. 161 (1974). The federal constitutional right to an abortion during the first trimester is now well-settled. *Roe* v.

Wade, supra. For the state to frustrate that right by its action would be violative of the constitutional guarantee. *Nyberg* v. *City of Virginia,* 495 F. 2d 1342 (8th Cir.), appeal dismissed, 419 U. S. 891, 95 S. Ct. 169, 42 L. Ed. 2d 136 (1974); *Doe* v. *Hale Hospital,* 500 F. 2d 144 (1st Cir. 1974), *cert. den.* 420 U. S. 907, 95 S. Ct. 825, 42 L. Ed. 2d 837 (1975). *Cf. State* v. *Norflett,* 67 N. J. 268 (1975). Accordingly, we do not construe the statute to be applicable to non-sectarian non-profit hospitals.

The judgment of the trial court is reversed and the matter remanded for the entry of an order in accordance with this opinion.

Supreme Court, U. S.
FILED
FEB 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, *et al.*,

Petitioners,

—v.—

JANE DOE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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38

TABLE OF CONTENTS

	Page
Opinion Below.....	1
Jurisdiction.....	2
Questions Presented.....	2
Statement of the Case.....	3
Argument.....	
I. The questions sought to be reviewed were never raised by Petitioners or passed upon in state courts below and, therefore, are foreclosed from review by this Court.....	6
II. No federal question is presented to this Court since the New Jersey Supreme Court decision rests solely on independent and adequate state grounds.....	12
Conclusion.....	18

TABLE OF AUTHORITIES

	PAGE
Cases:	
Cardinale v. Louisiana, 394 U.S. 437 (1969).....	8
Cousins v. Wigoda, 419 U.S. 477 (1975).....	15
Davis v. Morristown Memorial Hospital, 106 N.J. Super. 33 (Ch. Div. 1969).....	10,14
Doe v. Bellin Memorial Hospital, 479 F. 2d 756 (7th Cir. 1973).	17
Fay v. Noia, 372 U.S. 391 (1963)	15
Fox Film Corp. v. Muller, 296 U.S. 207 (1935).....	15
Greco v. Orange Memorial Hospital, 513 F. 2d 873 (5th Cir. 1975).....	17
Greisman v. Newcomb Hospital, 40 N.J. 389 (1963).....	13,14
Guerrero v. Burlington County Memorial Hospital, 70 N.J. 344 (1976).....	11,14
Herb v. Pitcairn, 324 U.S. 117 (1945).....	15
Huffman v. Pursue, 420 U.S. 603 (1975), reh. den. 421 U.S. 971 (1975).....	8
Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1961)....	15

	PAGE
Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875)..	15
Roe v. Wade, 410 U.S. 113 (1973), reh. den. 410 U.S. 959 (1973).....	16
Southwestern Bell Telegraph Co. v. Oklahoma, 303 U.S. 206 (1938).....	8
Street v. New York, 394 U.S. 576 (1969).....	8
Wainright v. Stone, 414 U.S. 21 (1973).....	17
Williams v. Kaiser, 323 U.S. 471 (1954).....	8
Constitutional Provision:	
United States Constitution Fourteenth Amendment.....	17
Federal Statutes:	
28 U.S.C. §1257.....	2,7,8
42 U.S.C. §1983.....	17
State Statutes and Regulation:	
New Jersey Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq.	14
N.J.A.C. 8:33-1.1 et seq.	14

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, et al.

Petitioners,

v.

JANE DOE, et al.,

Respondents.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

For the reasons stated below, the Petition for a Writ of Certiorari should be denied.

OPINION BELOW

The opinion of the New Jersey Supreme Court is reported at 71 N.J.478 (1976). The trial court's order following such opinion was entered on January 10, 1976 and is attached hereto.

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. § 1257 (3) (PW 1) 1/ However, that jurisdictional basis is inapplicable here, where the federal questions proposed by Petitioners were neither presented to nor decided by the New Jersey Supreme Court, and that Court's decision was based on independent state grounds.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction over questions which were neither presented to nor passed upon by state courts below?

2. Should this Court take jurisdiction in this case in view of its well-settled policy to deny review of decisions by a state court resting on independent and wholly adequate state grounds?

1/ References designated "PW" and followed by numerals refer to pages of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Respondents, Jane Doe, Mary Roe and their doctors, Edward S. Milner and Calvin Hahn, instituted an action seeking to invalidate Petitioner hospitals' regulations prohibiting elective abortions at the hospitals' facilities. The trial court dismissed the complaint, and Respondents appealed to the intermediate appellate court. During the pendency of the appeal, the Supreme Court of New Jersey took jurisdiction of the appeal by certification (69 N.J. 85) and reversed, on state grounds, the trial court's ruling. (PW App. A5-A12) 2/

Respondents made two claims in state court as to the invalidity of Petitioners' regulations: 1) the "non-constitutional rationale was that the hospitals, as quasi-public institutions, owed an obligation to the public, including the plaintiffs [Respondents], to make their facilities available; that the defendants [Petitioners] had violated that duty by establishing arbitrary and

2/ References designated "PW App.A" and followed by numerals refer to pages of the New Jersey Supreme Court opinion included in the appendix to the Petition for Writ of Certiorari.

unreasonable rules prohibiting elective abortions; that these rules were reviewable by the Court, and should be declared null and void" (PW App. A3); and 2) that Petitioners' activities were so imbued with state action as to lose their private character. (PW App. A2, A3)

The New Jersey Supreme Court never reached the question of whether Petitioners' rules constituted state action. Basing its decision solely on state grounds, the Court ruled that, under New Jersey statutes and case law, Petitioners were quasi-public institutions, with a duty to make their facilities available to the public and not to promulgate policies unrelated to medical care or public welfare. (PW App. A10) The Court held that the hospitals' regulations prohibiting elective abortions neither furthered medical standards nor served to make hospital facilities available for the care and treatment of the public. (PW App. A10, A11) In support of its ruling that the Court could declare rules of a quasi-public institution to be arbitrary and unreasonable, the Court reviewed and analyzed New Jersey statutes and case law confirming the status of New Jersey hospitals as quasi-public institutions and the power of New Jersey courts to review their rules. (PW App. A5-A10)

Following the New Jersey Supreme Court's decision, an order was entered on January 10, 1977 in the Superior Court of Cumberland County, New Jersey, stating, in pertinent part, as follows: "the Supreme Court [of New Jersey] having held that the policies of defendants herein prohibiting staff physicians from using the Bridgeton Hospital, Newcomb Hospital and Salem County Memorial Hospital facilities for elective abortions contravene the law of this state..it is..ORDERED that the aforesaid policies of defendants relating to elective abortions are declared contrary to New Jersey law..." (App. 1A-2A) This order is the judgment referred to by Petitioners in attempting to invoke the jurisdiction of this Court. (PW 1)

Petitioners never raised in state court the questions presented by them to this Court. Their contention there was simply "that they were private non-profit hospitals governed by their respective boards of trustees and that they had the absolute right to determine who should use their facilities and whether elective abortions should be permitted." (PW App. A3) The questions presented by Petitioners to this Court were not passed upon by the New Jersey Supreme Court.

Petitioners failed to comply with

Rule 23 1(f) of the Supreme Court Rules which requires that the Petition for Writ of Certiorari indicate the stage at and manner in which any federal questions were raised and the manner in which they were passed upon by the state court.

Respondents oppose the granting of certiorari in this cause because the questions proposed by Petitioners were neither presented to nor passed upon by the New Jersey Supreme Court, and that Court based its ruling solely on an adequate and independent state ground without reaching or ruling on any federal question.

ARGUMENT

I. THE QUESTIONS SOUGHT TO BE REVIEWED WERE NEVER RAISED OR PASSED UPON IN STATE COURTS BELOW AND, THEREFORE, ARE FORECLOSED FROM REVIEW BY THIS COURT.

The questions presented by Petitioner for review are as follows:

> 1. Is there a constitutional right to a "voluntary abortion" that may be asserted against a private hospital,as the court below held, or is there only a constitutional right not to have the State

> foreclose the performance of such abortions, as this Court has held?
>
> 2. Is it a violation of the Due Process Clause of the Fourteenth Amendment for a state court to compel the use of private hospitals to perform "voluntary abortions" on demand, contrary to the policies established by the governing bodies of these private hospitals? (PW 2)

In order to invoke the jurisdiction of this Court under 28 U.S.C.§1257 (3), Petitioners must establish in their petition that these questions were both presented to and passed upon by the New Jersey Supreme Court. Respondents submit that Petitioners have not, and cannot properly, establish these prerequisites, and that the sole and independent federal question presented below was never decided by the New Jersey Supreme Court.

In construing 28 U.S.C. §1257, this Court has long ruled that it has no jurisdiction over cases in which a federal question was not both raised and

passed upon below. Huffman v. Pursue, 420 U.S. 603 (1975), reh. den. 421 U.S. 971 (1975); Street v. New York, 394 U.S. 576 (1969); Cardinale v. Louisiana, 394 U.S. 437 (1969); Williams v. Kaiser, 323 U.S. 471 (1954); Southwestern Bell Telegraph Co. v. Oklahoma, 303 U.S. 206 (1938). In Cardinale v. Louisiana, supra, this Court indicated that, in addition to the jurisdictional requirements of 28 U.S.C. §1257, there are "sound reasons" for the Court's refusal to decide federal questions which were not raised or passed upon below.

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with these questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenges, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked on an adequate state ground. Even though States are not free

> to avoid constitutional issues on adequate state grounds [citation omitted], they should be given the first opportunity to consider them. 394 U.S. at 439.

Applying the holdings and rationale of these cases, the Court should not take jurisdiction over the instant case.

Petitioners have not asserted, nor could they properly do so, that they raised their federal questions before the lower courts. The only federal question presented below was raised by Respondents and is substantially different from those presented to this Court by Petitioners. That question was whether Petitioners' refusal to allow elective abortions constituted state action because of the federal, state, county and municipal aid received by them. That question was never reached by the New Jersey Supreme Court. The Court instead ruled on Respondents' alternative assertion that, under New Jersey law, Petitioners had an obligation as quasi-public institutions to make their facilities available to the public, and that Petitioners' rules prohibiting elective abortions were arbitrary and unreasonable.

Moreover, contrary to Petitioners' assertion in the first question presented, the Court never ruled that there was "a constitutional right to a voluntary abortion that may be asserted against a private hospital." (PW 2) Rather, the Court ruled that Petitioner hospitals are "quasi-public institutions whose actions must not contravene the public interest...Recognition by the Legislature of the special status of the hospital is consonant with its public nature and responsibilities. Judicial review and legislative control are predicated on recognition of the quasi-public status of the hospital and its obligation to serve the public." (PW App. A8) The Court then held Petitioners' rules invalid stating:

> The hospital rule or regulation should be related to the hospital's purposes and operational needs. Davis v. Morristown Memorial Hospital, 106 N.J. Super. 33, 43 (Ch. Div. 1969). Moral concepts cannot be the basis of a non-sectarian non-profit eleemosynary hospital's regulations where that hospital is holding out the use of its facilities to the general public. The board of trustees, although vested with managerial discretion within the framework of the hospital's functions and purposes, may not promulgate unrelated policies. When it does so, its determinations are unsupportable and arbitrary. Guerrero v. Burlington County Memorial Hospital, 70 N.J. 344, 256-357 (1976). (PW App. A10)

The Court thus ruled that, in light of New Jersey statutes and case law, Petitioners were under a duty to serve the public good, and that their rules prohibiting elective abortions did not serve this public purpose.

That the questions presented by Petitioners to this Court were not ruled upon by the New Jersey Supreme Court is made clear by the judgment and order of the trial court following the Supreme Court's decision, attached hereto. (App. 2A)That order reaffirms that the New Jersey Supreme Court's decision was a ruling on state, not federal, questions.

Further, because Petitioners did not present their federal questions to the New Jersey courts, nor were they

ruled upon, Petitioners could not and did not comply with Rule 23 1 (f) of the Supreme Court Rules. This rule requires that Petitioner indicate the stage at and manner in which any federal claims were raised and the way the same were passed upon by the state court. Petitioners' claim below, limited to an assertion of their private character and absolute discretion to establish governing rules and regulations, did not raise the federal claims they now seek to have reviewed. In light of both this claim and the substance of the lower court's ruling, Petitioners' inability to comply with Rule 23 is understandable.

II. NO FEDERAL QUESTION IS PRESENTED TO THIS COURT SINCE THE NEW JERSEY SUPREME COURT DECISION RESTS SOLELY ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This case clearly presents the question of whether or not the United States Supreme Court will substitute its view for that of the highest New Jersey state court as to the manner in which state law should be construed.

The decision of the New Jersey Supreme Court was based solely on state grounds. As discussed in Point I of this Brief, the Court eschewed ruling as to constitutional contentions in determining that Petitioners' regulations

prohibiting elective abortions were arbitrary and unreasonable. In deciding that Petitioners were quasi-public institutions, whose rules and regulations were subject to judicial scrutiny, the Court relied on Greisman v. Newcomb Hospital, 40 N.J. 389 (1963) and the network of New Jersey statutes governing the activities of hospitals. (PW App. A6-A8) Greisman established, as a matter of state common law, judicial review of hospital policies in the context of staff privileges. In reviewing Greisman, the Court stated that:

> Although Greisman, supra,dealt with the right of a doctor to apply for admission to the hospital staff and involved the somewhat monopolistic control over the rights of a doctor to practice medi:ine at a given location, the underlying principle rests...on a much broader basis, the obligation of a quasi-public entity to serve the public... The hospital trustees' managerial powers were deeply embedded in public aspects and, as fiduciary powers, had to be exercised reasonably and for the public good. (PW App. A7)

The Court further established the fiduciary relationship between the public and the hospitals by citing portions of the New Jersey Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq. and supporting regulations, N.J.A.C. 8:33-1.1 et seq. (PW App. A8)

Analogizing the regulation of hospitals to that of inns and common carriers, the Court cited both New Jersey and English case law for the proposition that there must be "a rational relationship, a causal nexus, between the reasons for the refusal" (PW App. A9) of services and the function of the institution. This analogy was in keeping with the Court's previous analysis of state law not only in Greisman, but also in Davis v. Morristown, 106 N.J. Super. 33 (Ch. Div. 1969) and Guerrero v. Burlington County Memorial, 70 N.J. 344 (1976).(PW App. A9,A10) The Court concluded that neither medical standards nor operational needs of the hospitals would warrant denial of facilities of "a non-sectarian hospital, whose basic purpose is to make available hospital facilities for the care and treatment of the public." (PW App. A11)

The adequacy of the above state grounds cannot and have not been challenged by Petitioners, and it is a well-settled principle that this Court will

not review a state court judgment based on independent and adequate state grounds. Cousins v. Wigoda, 419 U.S. 477 (1975); Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1961); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). The rationale for this position is clear.

> The reason[for the adequate state ground rule] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion...
> Herb v. Pitcairn, 324 U.S. 117 (1945) cited with approval in Fay v. Noia, 372 U.S. 391 (1963)

The independent and adequate state ground relied upon by the New Jersey Supreme Court is not transformed into a federal question by a passing reference to a federal constitutional right. Petitioners attempt to do precisely this by their statement that "[t]he New Jersey Supreme Court held that, because private hospitals are corporations affected with a public interest, and because the ['] federal constitutional right to an abortion is now well settled ['] Opinion, p. 15, (PW App. A11) their obligations are, in effect, the same as that of a state hospital in this regard." (PW 3) Petitioners' statement is a misleading and incorrect reading of the New Jersey Supreme Court's ruling. As discussed previously, the Court chose to rule solely on the basis of the non-constitutional issue presented to it, and thus its ruling differs from Petitioners' characterization. The Court's reference to "the federal constitutional right to an abortion during the first trimester" (PW App. A11) and its citation to Roe v. Wade, 410 U.S. 113 (1973), reh. den. 410 U.S. 959 (1973) (PW App. A11, 12) merely arose in the context of construction of a state statute.

Petitioners have not challenged the validity of the statute construed by the New Jersey Supreme Court, nor have they even challenged the Court's

construction of the statute. Since this Court is generally bound by the highest state court's construction of a state statute, Wainwright v. Stone, 414 U.S.21 (1973),certainly the Court can take no different position where the validity and construction of the statute are not even in question. A mere reference to a federal constitutional right in the course of the Court's attempt to uphold the validity of the state statute does not create a federal question.

Finally, Petitioners' comparison between the New Jersey Supreme Court's decision in the instant case and the decisions in Doe v. Bellin Memorial Hospital, 479 F. 2d 756 (7th Cir. 1973) and Greco v. Orange Memorial Hospital, 513 F. 2d 873 (5th Cir. 1975) is inapposite. In neither of those cases is there even a hint of the non-federal grounds relied upon by the New Jersey Supreme Court. Both deal exclusively with the issue of whether the governmental involvement in the activities of defendant hospitals rendered their anti-elective abortion regulations state action, contrary to 42 U.S.C. §1983 and the Fourteenth Amendment. This was precisely the federal question not resolved by the New Jersey Supreme Court. The Court instead chose to rely exclusively on an interpretation of state law.

CONCLUSION

For the reasons cited above, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

APPENDIX

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-CUMBERLAND COUNTY

DOCKET NO.

JANE DOE, et al.,

Plaintiffs,

v.

BRIDGETON HOSPITAL ASSOCIATION, INC., et al,

Defendants.

Civil Action
ORDER

This matter having been considered by the Supreme Court of New Jersey on certification pursuant to R.2:12-1 and the Supreme Court having held that the policies of defendants herein prohibiting staff physicians from using the Bridgeton Hospital, Newcomb Hospital and Salem County Memorial Hospital facilities for elective abortions contravene

the law of this state;

And the Supreme Court having held further that as a matter of statutory interpretation, N.J.S.A. 2A:65A-1 et seq. does not apply to the defendant hospitals, and the Supreme Court having therefore reversed the earlier judgment of this Court in this matter, and remanded the matter for entry of an order consistent with its opinion, and good cause appearing therefor, it is this 10th day of January 1977

ORDERED that the aforesaid policies of defendants relating to elective abortions are declared to be contrary to New Jersey law; and it is further

ORDERED that defendants, their agents and all persons acting in concert with them are and shall be enjoined from adopting, implementing and/or enforcing the aforesaid policies relating to elective abortions and/or any policy or practice which prohibts or limits or denies hospital facilities and assistance for the performance of elective abortions by physicians holding staff privileges at the defendant hospitals for any reason unrelated to the medical needs of the patients served by the defendant hospitals or which although related to the medical needs of the patients served by defendant hospitals,

imposes more stringent limitations on the performance of elective abortions than are imposed on the performance of medically comparable procedures, or in any other discriminates against doctors seeking to perform and patients seeking to obtain elective abortions.

/S/_____
GEORGE B. FRANCIS J.S.C.

Supreme Court, U. S.
FILED
FEB 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, ET AL.,
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vs.

JANE DOE, ET AL.,
Respondents.

REPLY BRIEF ON PETITION FOR CERTIORARI.

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REPLY BRIEF ON PETITION FOR CERTIORARI.

The response to respondents' objections to this Court's jurisdiction is two-fold.

First, there is no doubt that throughout this case, respondents relied on an alleged federal constitutional guarantee to a voluntary abortion. Nor is there any doubt that the State Supreme Court relied on the existence of such a federally-created right as the basis for its conclusion in this case:

> To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action. *Reitman* v. *Mulkey*, 387 *U.S.* 369 . . . (1967). Cf. *King* v. *So. Jersey Nat. Bank*, 66 *N.J.* 161 (1974). The federal constitutional right to an abortion during the first trimester is now well-settled. *Roe* v. *Wade, supra.* For the state to frustrate that right by its action would be violative of the constitutional guarantee. *Nyberg* v. *City of Virginia*, 495 *F.*2d 1342 (8th Cir.), appeal dismissed, 419 *U.S.* 891 . . . (1974). . . .

The essential role of the "federal constitutional right" in the decision of the court below, with regard to both the imposition of a duty on petitioners and the grant of a right to respondents, is abundantly clear.

If there were any question about the existence of the federal issues in the case, it is settled by a recitation of the entire dissenting opinion of Mr. Justice Sullivan in the New Jersey Supreme Court:

> Defendants are private, non-profit hospitals serving their respective communities on a voluntary basis. They have adopted a policy, based on social and moral considerations, of not permitting their facilities to be used for elective abortions. I do not view that policy as an infringement on the constitutional rights of the female plaintiffs or their physicians under *Roe* v. *Wade*, 410 *U.S.* 113, 35 *L. Ed.* 2d 147 (1973) and *Doe* v. *Bolton*, 410 *U.S.* 179, 35 L. *Ed.* 2d 201 (1973), particularly when elective abortion facilities were available within reasonable distances. Nor do I think that this Court's decision in *Greisman* v. *Newcomb Hospital*, 40 *N.J.* 389 (1963) mandates that such policy be held to be arbitrary and unreasonable and inimical to the public good. In the context of this litigation I would not require a sectarian or a private non-profit hospital to act contrary to its conscience. None of the cases cited in the majority so holds. I would affirm.

Nor can it be ignored that the New Jersey judicial decision on which the court below purported to rest its judgment, *Greisman* v. *Newcomb Hospital*, 40 N. J. 389 (1963), did justify the regulation of private hospitals on federal constitutional grounds; there, as here, the federal constitutional questions were resolved against petitioner's position:

> Indeed, in the development of the law, activities much less public than the hospital activities of Newcomb, have commonly been subjected to judicial (as well as legislative) supervision and control to the extent necessary to satisfy the felt needs of the time. See, Douglas, J., concurring in *Lombard* v. *Louisiana*, 373 *U.S.* 267 . . . (1963). See also *Munn* v. *Illinois*, 94 *U.S.* 113 . . . (1877); *German Alliance Ins. Co.* v. *Lewis*, 233 *U.S.* 389 . . . (1914); *Nebbia* v. *New York*, 291 U. S. 502 . . . (1934). . . . [40 N.J. at 396-97.]

All through this litigation, the issue of the constitutional rights of plaintiffs to secure voluntary abortions from defendants, and defendants' constitutional rights to be free from such compulsion, have been of the essence of the controversy. The decision of the Supreme Court of New Jersey determined the constitutional questions but sought to avoid responsibility for invasion of defendants' constitutional rights by making only oblique references to the questions at issue. This course of conduct cannot be tolerated if this Court is to have ultimate responsibility for the interpretation of the national Constitution.

CONCLUSION.

The court below has decided that plaintiffs have a federal constitutional right to voluntary abortion which is assertable against the petitioners. That is an erroneous holding about an important federal constitutional question and it should be reversed by this Court.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1976

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Petitioners,

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JANE DOE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF NEW JERSEY HOSPITAL ASSOCIATION, *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS	1
ARGUMENT:	
1. The New Jersey Supreme Court's decision represents an unfounded extension of this Court's decisions in Bolton and Wade	3
2. The New Jersey Supreme Court's decision has undermined and confused well established constitutional principles delineating the parameters of "state action"	5
CONCLUSION	7

Cases Cited

Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974)	6, 7
Doe v. Bellin Memorial Hospital, 479 F. 2d 756 (7th Cir. 1973)	4, 5
Doe v. Bolton, 410 U.S. 179 (1973)	3
Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974) cert. den. 420 U.S. 907 (1975)	5, 6
Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974), appeal dismissed, 419 U.S. 891	5, 6
Reitman v. Mulkey, 387 U.S. 369 (1967)	5
Roe v. Wade, 410 U.S. 113 (1973)	3, 5

PAGE

Statutes Cited

N.J.S.A. 2A:65-A-1 ..... 2, 3, 5
N.J.S.A. 2A:65A-2 3
N.J.S.A. 2A:65A-3 3
42 U.S.C.A. (Hill-Burton Act):
Sec. 300a-7(a) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, *et al.*,
Petitioners,

vs.

JANE DOE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF NEW JERSEY HOSPITAL ASSOCIATION, *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

Interest of the *Amicus*

Amicus Curiae New Jersey Hospital Association respectfully files this brief in support of petitioners' request that a Writ of Certiorari issue from this Court to review

the judgment of the Supreme Court of New Jersey in the above-entitled cause.[1]

The New Jersey Hospital Association is a nonprofit corporation of the State of New Jersey, whose membership includes 87 nonsectarian nonprofit New Jersey hospitals. Since its inception in 1918 the Association has developed a particular expertise in the fields of hospital administration and hospital law. Over the course of those years it has applied its considerable experience towards the establishment of an efficient and professionally expert system of hospital care in New Jersey. To this end it has appeared as *Amicus Curiae* in various judicial proceedings throughout the state, and in fact, appeared as *Amicus Curiae* in this cause both at the trial level—where the court allowed it to participate as fully as any of the parties thereto—as well as before the New Jersey Supreme Court.

As essentially a trade organization, the New Jersey Hospital Association has never espoused a particular position nor otherwise sought to pass judgment upon the various religious or moral questions surrounding the issue of elective abortions. On the contrary, the Association has consistently supported the concept of institutional conscience, and, in fact, by resolution of its Board of Trustees gave its unqualified support to *N.J.S.A.* 2A:65A-1 *et seq.*, often referred to as the conscience law.

Thus, the New Jersey Hospital Association is deeply concerned with the New Jersey Supreme Court's decision in this matter, not only because it directs that those hos-

[1] Counsel for the Petitioners and the Respondents have consented to the filing of this brief, and true copies of letters verifying their consent have been, or will be filed with the Clerk.

pitals which do not now allow elective abortions must do so in the future, but, more importantly, it totally abrogates the concept of an institutional conscience as that concept applies to all nonsectarian hospitals, and as it is recognized in *N.J.S.A.* 2A:65A-1 *et seq.*

ARGUMENT

1. The New Jersey Supreme Court's decision represents an unfounded extension of this Court's decisions in *Bolton* and *Wade*.

Following this Court's decisions in *Doe* v. *Bolton*, 410 *U.S.* 179 (1973), and *Roe* v. *Wade*, 410 *U.S.* 113 (1973), nonsectarian nonprofit hospitals were left with what was believed to be a choice regarding their individual policies on the question of elective abortions. Subsequently, the New Jersey Legislature enacted *N.J.S.A.* 2A:65A-1 *et seq.* further confirming in the clearest of terms that hospitals and hospital personnel were free to reach their own determinations as to whether to provide, perform, or assist in the performance of, an abortion or sterilization.

In concluding that *N.J.S.A.* 2A:65A-2 and *N.J.S.A.* 2A:65A-3 do not apply to nonsectarian nonprofit hospitals, and that "[m]oral concepts cannot be the basis of a nonsectarian nonprofit eleemosynary hospital's regulations where that hospital is holding out the use of its facilities to the general public," (New Jersey Supreme Court Opinion, Petitioner's Appendix at A-10) the New Jersey Supreme Court relied upon this Court's rationale in the *Bolton* and *Wade* decisions. While those decisions clarified and substantiated a pregnant woman's right not to be statutorily precluded from obtaining an abortion, there

is no logical foundation for the conclusion that the hospitals here in question must therefore allow such abortions to take place in their facilities, notwithstanding established hospital policy to the contrary. This decision is not merely unprecedented, it is diametrically opposite to the factually analogous decision of the Court of Appeals for the Seventh Circuit in *Doe* v. *Bellin Memorial Hospital,* 479 *F.* 2d 756 (7th Cir. 1973). The *Bellin* court noted:

> "There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves." (479 *F.* 2d 759-60.)

Thus, the New Jersey Hospital Association fully concurs with the Petitioners, and submits that the *Bridgeton* decision has the potential impact of denying our 87 nonprofit nonsectarian member hospitals their constitutional right to due process of law by compelling them to perform elective abortions. (See discussion and cases cited by Petitioners at P-5).

2. The New Jersey Supreme Court's decision has undermined and confused well established constitutional principles delineating the parameters of "state action."

In reaching its decision, the court below held that by permitting a nonsectarian nonprofit hospital to choose—as a matter of hospital policy—whether or not it would allow its facilities to be used for elective abortions, the New Jersey conscience law as reflected in *N.J.S.A.* 2A:65A-1 *et seq.* ". . . clearly constitut(ed) state action . . . ." The court cited *Reitman* v. *Mulkey,* 387 *U.S.* 369 (1967) as authority for this proposition. (A-11).

Without further amplification, the court proceeded to determine from its conclusory premise that by statutorily permitting such a choice the State of New Jersey had frustrated "the Federal constitutional right to an abortion . . ." settled by this Court's decision in Wade, *supra.* Relying upon *Nyberg* v. *City of Virginia,* 495 *F.* 2d 1342 (8th Cir. 1974), appeal dismissed, 419 *U.S.* 891 and *Doe* v. *Hale Hospital,* 500 *F.* 2d 144 (1st Cir. 1974) *cert.* den. 420 *U.S.* 907 (1975) the court thereafter held that the statute thereby violates a woman's "constitutional guarantee" and hence cannot be applied to nonsectarian nonprofit hospitals (A-11, 12).

In weighing the impact of this determination it must initially be noted that neither the *Reitman* decision nor any of its progeny have gone so far as to hold that "state action" may be found where the state's posture is one of complete neutrality. More importantly, the Seventh Circuit's decision in *Bellin, supra,* at 479 *F.* 2d 760 specifically held that when a state takes such a neutral position ". . . it may *expressly* authorize such hospitals . . ." (emphasis added) to reach their own decision.

Additionally, the court below relied upon *Nyberg* and *Hale Hospital, supra,* without addressing the fact that neither of those decisions involved a dispute over whether "state action" was involved. In fact, the court in *Hale Hospital* specifically limited its holding to *public* hospitals by noting that the rights of "privately controlled" hospitals were not relevant to the questions there in issue. *Hale Hospital, supra,* at 500 *F.* 2d 146, n.2. Similarly, in *Nyberg* the court noted that the parties did not even contest the question of "state action", as a public hospital was involved. *Nyberg, supra,* at 495 *F.* 2d 1345, n.3.

The New Jersey Hospital Association respectfully submits that by failing to provide a definitive constitutional basis for its action, the New Jersey Supreme Court has left all nonsectarian nonprofit hospitals without guidance as to what now constitutes "state action." This situation is compounded by the fact that plaintiffs below based their constitutional attack on "state action" assertedly founded upon the receipt of ". . . federal, state, county and municipal financial aid . . . by the hospitals. . . ." (A-3). Unfortunately, the court's opinion offered no explanation as to what part the receipt of these funds played in its ultimate decision, and thereby further beclouded the "state action" issue.

Similarly, the decision implicitly undermines the seemingly clear mandate of the "Church Amendment" (42 U.S.C.A. 300a-7(a)), which precludes a court or administrative body from requiring a hospital to make its facilities available for elective abortions simply because it receives federal funds under the so called "Hill-Burton Act." As was noted in *Chrisman* v. *Sisters of St. Joseph of Peace,* 506 *F.* 2d 308 (9th Cir. 1974), Congress clearly intended that receipt of such funds could not be advanced as a basis for a finding of "state action" where a hospital

has prohibited elective abortions ". . . on the basis of religious beliefs or moral convictions." *Id.* at 310.

The New Jersey Supreme Court's decision with respect to the question of "state action" affects not only the right of some nonsectarian nonprofit hospitals to refuse to permit elective abortions, but has ramifications far beyond this limited issue for all nonsectarian nonprofit hospitals. The New Jersey Hospital Association respectfully urges that this Court grant the Writ here sought in order that the above noted inconsistencies on the substantial constitutional questions involved in this matter may be finally determined.

CONCLUSION

For the above reasons and those set forth in the Petition for Writ of Certiorari, *Amicus Curiae* New Jersey Hospital Association respectfully urges this Court to grant certiorari to review the judgment of the New Jersey Supreme Court in this case.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 2 1977
MICHAEL RODAK, JR., CLERK

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INTEREST OF THE AMICUS

Amicus Curiae American Hospital Association respectfully presents this brief in support of Petitioners' request that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of New Jersey in the above-entitled cause.

Counsel for the Petitioners and the Respondents have consented to the filing of this Brief. True copies of letters evidencing such consent have been lodged with the Clerk of the Court.

The American Hospital Association is the primary organization of hospitals and other health care institutions in this

country. It is a not-for-profit membership corporation organized under the laws of the State of Illinois, and has as it principal corporate object "to promote the welfare of the public through its leadership and its assistance to its members in the provision of better health services for all the people". It enjoys a federal income tax exemption under the provisions of Section 501(c)(6), Internal Revenue Code. Its membership includes 5,158 acute care general hospitals in the country. Those hospitals include approximately 2,500 hospitals that would be embraced by the term "non-sectarian non-profit" as used in the New Jersey Supreme Court Opinion, Appendix to Petition, p. A12.

The American Hospital Association is neutral on the issue of elective or nontherapeutic abortions. Among its hospital membership, there are "non-profit non-sectarian" hospitals that have no hesitancy in permitting use of their facilities for elective or nontherapeutic abortions. There are also a substantial number of such hospitals that, by reason of religious or moral convictions, gravely object to use of their facilities for that purpose.

The American Hospital Association has but one position on the subject, namely, that private hospitals, members of hospital medical staffs and other individuals, should not be required to participate in such abortions when they have religious or moral convictions against doing so.

Their right of choice, to participate or not to participate in such abortions, is entitled to equal protection with the rights of pregnant women and their physicians. The rights of private hospitals, particularly those that have such religious or moral convictions against participation in elective or nontherapeutic abortions, are adversely affected by the New Jersey decision.

In keeping with its position of neutrality on the subject, and in support of private hospitals adversely affected by the New Jersey decision, the American Hospital Association urges the issuance of a writ of certiorari as requested by the defendant hospitals below.

ARGUMENT

Supplementary to the position of the Petition, the American Hospital Association would also urge the following:

1. The Decision Below Improperly and Unnecessarily Infringes on the Rights of Private Hospitals.

First, the rights of hospitals adversely affected by the New Jersey decision should not be contravened and made subordinate to the rights of the original plaintiffs, both pregnant women and their attending physicians, to have elective or nontherapeutic abortions performed. The rights of pregnant women and their attending physicians can be recognized and accommodated without impinging on the coequal rights of those adversely affected by the New Jersey decision.

2. The Decision Below Gives Erroneous Construction to Decisions of this Court, is Contrary to Federal Statutory Law and is in Conflict with Proper Construction of Such Law.

Next, the New Jersey decision was patently based on erroneous construction of this Court's decisions relating to constitutional rights on the subject of abortion. Unless corrected and clarified, the decision below will place a cloud on the rights of those hospitals situated in other states that would be adversely affected by similar decisions. Moreover, the validity of state statutes relating to the "right of conscience" (the right of private hospitals and individuals to refrain from participating in elective or nontherapeutic abortions) that have been adopted in various states throughout the country, both prior and subsequent to the decision of this Court in *Doe* v. *Bolton*, 410 U. S. 179 (1973), will be placed in serious jeopardy and would ultimately require decision by this Court to sustain their validity.

Further, the New Jersey decision is contrary to federal law, (the so-called "Church Amendment", 42 U. S. C. § 300a-7(a),

set forth in the Appendix to this brief) and is inconsistent with and contrary to the decision of the Court of Appeals for the Ninth Circuit in *Chrisman* v. *Sisters of St. Joseph of Peace*, 506 F.2d 308 (1974). The decision below is based on the erroneous assumption that receipt of state or federal funds by the hospital defendants would require the hospitals and those similarly situated to submit to the will of pregnant women and their attending physicians, contrary to religious and moral convictions of the institutions themselves.

3. The Decision Below Usurps Legislative Authority.

Finally, the New Jersey decision is violative of the constitutional division of governmental authority. It begins with the premise, based on its own judicial precedents, that private hospitals constitute "quasi-public" institutions, a classification subject to legislative determination. It then proceeds to suspend a direct legislative act of the State of New Jersey* by ruling that "non-sectarian non-profit" hospitals shall not be subject to or entitled to the provisions of that act. Petitioners' Appendix, p. A12. The decision further does violence to New Jersey's Health Care Facilities Planning Act, N. J. S. A. 26:2H-1 *et seq.*, by prescribing that the services that must be performed by hospitals in the State of New Jersey (*e.g.*, elective or nontherapeutic abortions) are to be determined by judicial pronouncement, contrary to legislative determination and specific legislative arrangement.

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* N. J. S. A. 2A:65A-1 *et seq.*, "commonly referred to as the conscience law," in the words of the New Jersey Supreme Court, at Petitioners' Appendix, p. A11.

CONCLUSION

For the above reasons and those set forth in the Petition for Writ of Certiorari, we urge this Court to grant certiorari to review the judgment of the New Jersey Supreme Court in this case.

Respectfully submitted,

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APPENDIX

42 U. S. C. §300a-7(a) provides as follows:

The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require—

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to—

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.